IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NOS. 49 AND 57 OF 2003.

CRIMINAL APPEAL NO. 49 OF 2003.

Mr. Vijay Bahadur,
Nepalese National,
r/o Village Kerki,
P.S. Mohat, Dist. Kulum,
Kathmandu, Nepal.
H.No. 257, c/o Suresh
Govind Padloskar, Malpem,
Pernem, Goa. ... Appellant.

Versus

State of Goa. ... Respondent.

CRIMINAL APPEAL NO. 57 OF 2003.

Mr. Bhakta Bahadur,
Central Jail, Aguada,
Sinquerim, Goa. ... Appellant.

Versus

State of Goa. ... Respondent.

Mr. J.P. D'Souza with Ms. C. Collasso, Advocates for the Appellant in both Appeals.

Mrs. W. Coutinho, Additional Public Prosecutor for the Respondent in both Appeals.

Coram : P.V. HARDAS, J.

Date : 18th March 2004.

ORAL JUDGMENT.

The appellants/original accused 1 and 2 have filed the present appeals challenging the conviction for offences punishable under Sections 20(b)(ii)(C) and 20(b)(ii)(A) of the N.D.P.S. Act and the sentences of rigorous imprisonment for ten years and fine of Rs. 1 lakh each, in default simple imprisonment for one year

and rigorous imprisonment for five days and fine of Rs. 500/- each, in default simple imprisonment for one day respectively, passed by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment, dated 16th July 2003, in Special Criminal Case No. 30 of 2001.

2. The facts in brief, as are necessary for the decision of the appeals, are stated hereunder:-

P.W.4 P.I. Anant Virnodkar, who was attached to the Anti Narcotic Cell, Panaji, as Police Inspector, received a secret and reliable information on 10th April 2001 that two Nepali persons, aged about 20 years, who were residing in a rented room behind the house of one Suresh Padloskar, were dealing in and selling charas.The said information was reduced to writing and the same is at Exhibit 24 Colly. P.W.4 P.I. Virnodkar thereafter sent a copy of the said information to P.W.5 Dy.S.P. Finton D'Souza, who received the copy of the said information at Exhibit 24 Colly. P.W.4 P.I. Virnodkar thereafter requisitioned the services of two panchas, namely, P.W.3 Santosh Mandrekar and another person. The panch witnesses were apprised about the information received by P.W.4 P.I. Virnodkar at Exhibit 24 Colly. On the panch witnesses agreeing to act as panchas for the raid, they were introduced to the members of the raiding party. The raiding party then proceeded in a

jeep. P.W.4 P.I. Virnodkar carried with him the seal of the Anti Narcotic Cell, Panaji, Goa, while a Police Constable carried the kit box containing the weighing, packing and sealing materials. The raiding party reached Malpem, Pernem at about 11.45 a.m. and stopped their jeep near the petrol pump. Thereafter P.W.4 P.I. Virnodkar alighted from the jeep and went a little ahead and returned after confirming the location. The raiding party then went towards the rented room behind the house of Suresh Padloskar. They reached the house at about 12.00 p.m., and saw two persons seated on the floor. The door was ajar. P.W.4 P.I. Virnodkar knocked at the door and identified himself as Police Inspector from Anti Narcotic Cell, Panaji, Goa, and also apprised the said two persons about the secret and reliable information received by him. The said two persons were asked to disclose their names and they disclosed their names as Bhakta Bahadur and Vijay Bahadur, both from Nepal. The said two persons, during the trial, had been identified as the accused 1 and 2. P.W.4 P.I. Virnodkar then introduced the members of the raiding party to the two accused and apprised them that they had a right to be searched either before a Gazetted Officer or a Magistrate. Both the accused declined the offer by saying 'Nahi Chahiye'. Both the accused were also informed that they had a right to search the raiding party. Both the accused also declined that offer. On

the personal search of Bhakta Bahadur/accused no. 1, two cylindrically shaped blackish substances individually wrapped in polythene paper were found in the right side pant pocket. After sniffing at the said substance P.W.4 P.I. Virnodkar opined that he suspected the substance to be charas. The said substance was weighed and found to weigh 14 grams. The said substance was then placed in an envelope, sealed with the seal of Anti Narcotic Cell, Panaji, Goa-1 and signed by the two panchas, the accused and P.W.4 P.I. Virnodkar. On the personal search of Vijay Bahadur/accused no. 2, blackish colour substance in cylindrical shape wrapped in polythene paper was found in the right side of the pant pocket. On sniffing the same P.W.4 P.I. Virnodkar opined that he suspected the substance to be charas. The said substance was weighed and was found to weigh 8 grams. It was also similarly packed and sealed as the earlier substance. The clothes of the accused were separately packed and sealed. Further search did not yield anything material. Thereafter, the search of the room was undertaken. The said room was 5 metres in length and 4 metres in width. It had one door and two small windows. Towards the left hand side of the door a bluish colour rexine bag with shoulder and hand belts having five different compartments was noticed. On opening the four compartments, nothing was found. On opening the main compartment, polythene bags, one white

in colour and another brinjal in colour were found. On opening the white colour polythene bag, it was found to contain eight autopress polythene bags containing blackish substance, which was suspected to be charas. On weighing the substance contained in the eight autopress polythene bags, it was found to weigh 3.125 kilograms. On opening the other bag, that is, the brinjal colour bag, it was found to contain two autopress polythene bags containing cylindrical and spherical shaped blackish colour substance, some wrapped in polythene paper and some without the wrapping. On weighing the substance, it was found to weigh 3.400 kilograms. The substance in both the bags were packed together and weighed and were found to weigh 6.525 kilograms. On further search of the rexine bag, certain other clothes of the accused were found, which were retained and the rexine bag was also seized. Since the accused did not have any legal documents in support of the possession of Narcotics, they were informed that possession of narcotics was an offence and after the seizure report, at Exhibit 14, was prepared and signed by the panchas, the accused and P.W.4 P.I. Virnodkar, a panchanama of the entire sequence of the offence was drawn, at Exhibit 15. The accused were arrested. The raiding party thereafter returned to the police station and P.W.4 P.I. Virnodkar lodged his complaint at Exhibit 21 and, thereafter, he handed over the seal of

the Anti Narcotic Cell, Panaji, to P.W.5 Dy.S.P. Finton D'Souza. The seized muddemal property was registered in the register of muddemal. The intimation under Section 57 of the N.D.P.S. Act was sent to his Superior, which is at Exhibit 23. The property was, thereafter, sent on the next day for analysis and was received by P.W.2 P.S.I. Krishna Shetgaonkar. P.W.2 P.S.I. Shetgaonkar then transmitted the property to P.W.1 Mahesh Kaissare, who after analysing the substance submitted his report, which is at Exhibit 8.

3. Further to completion of the investigation, a charge-sheet against the present appellants came to be filed. The learned Special Judge, vide Exhibit 4 framed a charge against the accused. The accused denied their guilt and claimed to be tried. The prosecution in support of their case examined 6 witnesses. The defence of the accused appears to be of denial. Both of them claim that they were falsely implicated. The learned Special Judge, on appreciation of the evidence, convicted and sentenced the accused as aforestated. Hence, the present appeals.

4. The pivot of the prosecution case is the testimony of P.W.3 Santosh Mandrekar and P.W.4 P.I. Virnodkar. P.W.3 Santosh speaks about being called to the police station on 14th April 2001. Then he states

about proceeding to the house of Suresh Padloskar and about the seizure of the drugs. He has also spoken about the appraisal of right to be searched before a Gazetted Officer or a Magistrate being informed to the appellants/accused. He speaks about the seizure and sealing of the drugs. There is nothing worthwhile which has been brought out in the testimony of this witness to discredit the testimony of this witness.

5. Similar is the testimony of P.W.4 P.I. Virnodkar. He is categorical in his statement that the seal of the Anti Narcotic Cell, Panaji, was handed over by a letter, at Exhibit 22, to the Dy.S.P., CID Crime Branch. P.W.5 Dy.S.P. Finton D'Souza has also corroborated the version of P.W.4 P.I. Virnodkar regarding the deposit of the seal. P.W.6 Suresh Padloskar, the landlord of the appellants, has been examined by the prosecution. He states that he runs a tea stall and, on 7th April 2001, both the appellants had approached him in respect of renting the room. He states that he had constructed a room, which was used for storing fire wood. He states that he had let out the room to the accused on a monthly rent of Rs. 500/-. He further states that he removed the fire wood from the room and gave it to the accused. He also states that he handed over the key and lock to the accused when he let the room to them. He also states that one of the

accused was carrying a rexine bag on his shoulder. He then states that four days thereafter his wife had sent a message to him at the tea stall that the police had come to his house. He states that he had gone to the room where the accused were residing. He states that he stayed there for some time and returned to the tea stall. He states that after some time he was again called to the room and the police handed over the key of the room to him. According to him, he had gone to the room at about 12.00 o'clock. He further states that the police had left after about 10 minutes of his visit there. He states that the police had found blackish substance in the bag, which was weighed and put back in the bag by the police and taken away.

6. Mr. D'Souza, the learned counsel for the appellants/accused, has urged four points before me. Firstly, according to him, P.W.3 Santosh speaks about being called to the police station for the purpose of carrying out the raid on 14th April 2001. As per the prosecution evidence and the panchanama, at Exhibit 15, the raid had taken place on 10th April 2001. Mr. D'Souza has further submitted that a question had been put to the accused in their statement under Section 313, at Question No. 26, which states that P.W.3 Santosh Mandrekar attended the police station on 14th April 2001. It is thus submitted that firstly P.W.3 Santosh

does not corroborate the prosecution evidence at all and secondly the accused are prejudiced as the fact that P.W.3 Santosh acted as a panch on 10th April 2001 was not put to the accused in their statement under Section 313. Secondly it is stated that P.W.4 P.I. Virnodkar states that he had kept the muddemal 'in safe custody' without specifying the exact place where the said muddemal was kept. It is, therefore, urged that the prosecution has not been able to establish that the property which was seized was the same property which was analysed by P.W.1 Mahesh Kaissare. Thirdly, it is urged that the specimen seal impression contains the crime number. Admittedly, according to the prosecution, the crime number was typed on the said letter. It is inconceivable as to how the crime number came to be typed in the said letter. Fourthly, the learned counsel has also urged that, admittedly, assuming the prosecution to be correct, that is, the bag was found in the room occupied by the accused and both the accused have not been able to prove contrary to it, according to the learned counsel, the charge at Exhibit 4 is defective as it does not spell out that 6.525 kilograms of charas was found in the conscious possession of the accused. Thus, it is submitted that the entire evidence is wholly insufficient for convicting and sentencing the accused.

7. The learned Additional Public Prosecutor has supported the Judgment of the learned trial Court and has stated that the discrepancies which have been pointed out by the learned counsel for the appellants/accused are minor discrepancies and are peripheral to the prosecution case and do not affect the prosecution case. According to the learned Additional Public Prosecutor, the evidence is sufficient for convicting and sentencing the accused.

8. Turning to the first point urged on behalf of the accused, it is true that P.W.3 Santosh in his evidence has stated that he was called to the Police Station to act as a panch in the raid on 14th April 2001. It is equally true that the panchanama and the other documents as well as the oral testimonies of the prosecution witnesses, particularly P.W.4 P.I. Virnodkar and P.W.5 Dy.S.P. Finton D"Souza speak about the raid on 10th April 2001. It is also true that the prosecution has made no attempt to obtain any clarification from P.W.3 Santosh regarding the discrepancy about the date which has crept in his evidence. The question is whether the discrepancy can at all be said to be such as to jettison the testimony of P.W.3 Santosh. P.W.3 Santosh at the close of his examination has emerged as a truthful witness. A perusal of the cross-examination shows that nothing

worthwhile supporting the accused has been brought out to doubt his claim that he had been called as a panch witness. Witnesses when referring to dates or certain events rely principally on their memory. Human memory being palpable, it is quite common for a witness to state a wrong date. All the documents and evidence point out that the raid was conducted on 10th April 2001 and P.W.3 Santosh was called to act as a panch on 10th April 2001. Merely because the date is wrongly mentioned, the evidence of P.W.3 Santosh cannot be discarded nor can it be held that the evidence of P.W.3 Santosh cannot be used to corroborate the evidence of P.W.4 P.I. Virnodkar and P.W.5 Dy.S.P. Finton D'Souza. Therefore, according to me, this submission of the learned counsel on behalf of the appellants/accused is not well merited.

9. Turning to the next submission, it was urged that the day on which the muddemal was seized it was sent to the C.I.D. Office but since the C.I.D. office was closed, the muddemal had to be brought back and kept in the police station. In this regard P.W.4 P.I. Virnodkar has stated that he had kept the property in 'safe custody'. Normally whether the property is kept in safe custody or not is an inference to be drawn by the Court on the basis of true facts. It is not enough for the witness to state that he had kept the property

in 'safe custody'. In this case P.W.4 P.I. Virnodkar has stated that on return from the raid, the muddemal was entered in the muddemal register. He, thereafter, speaks about removing the property for sending it to the C.I.D. Office and, thereafter, keeping it back. The cross-examination, though lengthy, does not affect the veracity of this witness that the property was kept in a safe place or safe custody. In the absence of any effective cross-examination on this aspect, I am not inclined to grant any relief to the accused merely because P.W.4 P.I. Virnodkar has stated that it was kept in safe custody without specifying the exact place where it was kept. Obviously no animosity has been shown to be harboured by P.W.4 P.I.Virnodkar and P.W.5 Dy.S.P. Finton D'Souza qua the accused. Therefore, according to me, though the evidence in this regard is not clear and precise, the prosecution has established that the property was kept in safe custody and there was no possibility of the muddemal being tampered with. This assumes importance in view of the fact that P.W.4 P.I. Virnodkar states that he had deposited the seal with P.W.5 Dy.S.P. Finton D'Souza by letter at Exhibit 22. There is nothing in the evidence to doubt the veracity of this statement. If the seal had been deposited with P.W.5 Dy.S.P. Finton D'Souza, there was no possibility of the muddemal being tampered with and if that be the case, there is no hesitation for this Court in accepting

that the property had been kept in safe custody.

10. Turning to the third submission. It is true that in the specimen seal impression letter, at Exhibit 7 Colly, which is a typed document, the crime number in respect of the offence is stated. The crime number obviously is put after registration of the offence and, according to P.W.4 P.I. Virnodkar, he had lodged a complaint, at Exhibit 21, after returning to the police station. However, the attention of P.W.4 P.I. Virnodkar was not invited to this aspect. There is absolutely no cross-examination nor any foundation laid for advancing this submission. Had the attention of P.W.4 P.I. Virnodkar been invited to this aspect, he would obviously offer an explanation. At any rate this is not a circumstance sufficient, by itself, to affect the veracity of what the witness has stated. Therefore, according to me, this submission of the learned counsel for the appellants/accused is also not well merited.

11. It is next urged before me that the prosecution has not been able to establish that the accused were in conscious possession of the contraband, though it was recovered from the accused. Admittedly, both the accused were from Nepal. They jointly approached P.W.6 Suresh Padloskar for renting a room. Both of them were residing together in that room. The

accused do not offer any explanation in their statement under Section 313 regarding the presence of the bag. In fact, according to them, the contraband was not seized from the room. According to them, they were not residing in the said room. Since the accused have not laid any foundation as to how the bag was in the room and since the bag was recovered from the room occupied by the accused, the accused can be said to have been in conscious possession of the contraband. The learned counsel for the State has drawn my attention to the Judgment of the Apex Court in **Madan Lal and another v. State of Himachal Pradesh,** 2003 CRI.L.J. 3868. In the aforestated reported Judgment the Apex Court has held that once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. In the present case the accused have not laid any foundation to doubt that the contraband was not within their conscious possession.

12. Lastly it is urged by the learned counsel for the appellants/accused that the charge is defective. According to the learned counsel, the charge at Exhibit 4 does not state that 6.525 kilograms charas were seized and both the appellants/accused were in possession of the said charas. The charge states that 14 grams and 8 grams of charas were respectively recovered from the

person of the accused and during the search of the room occupied by the accused 6.525 kilograms of charas were also seized. The charge then further states 'both of you were in illegal possession of charas and you have thereby committed offence punishable under .....'. Thus, the charge in very explicit terms informs the accused that they were in illegal possession of the various quantities of charas. Therefore, according to me, there is absolutely no defect in the charge. In any event defect in the charge would not vitiate the trial unless the accused were prejudiced. The accused were aware that the case of the prosecution was that 6.525 kilograms of charas were seized from the room and, thus, even if there was a defect in the charge, the accused were in conscious possession of the contraband.

13. I have given my anxious consideration to the rival submissions advanced by the counsel. According to me, the prosecution has been able to establish the offence beyond reasonable doubt and interference in the conviction and sentence is not called for. Accordingly, Criminal Appeals are dismissed. Since the appellants/accused are in jail, a copy of the Judgment be sent to them.

(P.V. HARDAS)
JUDGE.

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